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AZHAR CHE WIL

v.

PP & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
WAN ADNAN MUHAMAD JCA
HISHAMUDIN MOHD YUNUS JCA
[CRIMINAL APPEAL NOS: C-05-27-06 & C-05-94-05]

C

25 MAY 2009

CRIMINAL LAW: *Penal Code - Sections 302, 35 - Murder, ingredients of - Intention to cause bodily injury sufficient in ordinary course of nature to cause death - Prisoner viciously assaulted by prison*

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officer - Prison officer kicking, stomping on and banging prisoner's head against wall and concrete floor - Whether evincing intention to cause death Whether mens rea established - Penal Code s. 300(c)

CRIMINAL PROCEDURE: *Charge - Amendment - Failure to amend charge - Appellant charged with other accused persons under ss. 302 read with 35 of the Penal Code - Appellant called to enter defence whilst others acquitted - Charge not amended by deleting s. 35 - Whether appellant misled by omission to amend charge - Whether miscarriage of justice caused - Whether omission curable - Criminal Procedure Code, s. 422*

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The appellant was charged with six others for murder under s. 302 read with s. 35 of the Penal Code. On the DPP's concession, the sixth accused was acquitted and discharged during the prosecution's case. At the close of the prosecution's case, only the appellant was called to enter his defence. The other

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accused persons (the 2nd, 3rd, 4th, 5th, 7th accused persons) were acquitted and discharged. The case against the appellant – a prison officer – was that he had violently and incessantly assaulted a prisoner in a prison lock-up. The appellant allegedly hit, stomped on and kicked the head of the prisoner against the wall and

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concrete floor of the lock-up, causing the prisoner to lapse into a coma and subsequently die in hospital some nine days after the assault. The forensic medical evidence revealed that the prisoner died due to multiple blunt trauma to his head, resulting in sub-arachnoid haemorrhage in his brain. The appellant was convicted

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and sentenced to death by the High Court and he appealed to the Court of Appeal. The DPP also appealed against the acquittal and discharge of the other co-accused persons (the 2nd, 3rd, 4th,

5th, 7th accused persons). In the Court of Appeal, apart from impugning the conviction and sentence, counsel for the appellant argued that the trial judge's failure to amend the charge against the appellant from one under s. 302 read with s. 35 of the Penal Code to one solely under s. 302, after acquitting and discharging the other accused persons, constituted a serious error that necessitated at least a re-trial.

Held (dismissing the appeals of the appellant and the DPP) Per Suriyadi Halim Omar JCA (Wan Adnan Muhamad JCA concurring) delivering judgment of the majority:

(1) In the instant appeal, only the assault at the lock-up indicated the whereabouts, time and how the fatal injury was inflicted upon the deceased victim. The trial judge was correct in finding that only the appellant had caused the victim's death. Further, there was no break in the chain of causation and the victim's death was proximate to the acts of violence visited upon him. (para 14)

(2) Applying the provisions of ss. 299, 300 and 302 of the Penal Code, apart from establishing that the appellant caused the death of the victim, it was also incumbent upon the prosecution to show that the appellant did it in circumstances that fell squarely within one of the limbs of s. 300. In the instant appeal, the appellant had committed an act that fell squarely within limb (c) of s. 300 of the Penal Code – an act done with the intention of causing bodily injury to the deceased victim; and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The prosecution had successfully established that specific *mens rea* (mental element) for the bodily injury, which eventually led to the resultant death, as seen from the manner the head of the deceased was kicked and stomped against the concrete wall and floor. The evidence of the repeated assaults on the head of the deceased, looking at it objectively, was more than sufficient to establish the requisite intention as prescribed by the 3rd limb of s. 300 of the Penal Code. (*Rajwant Singh v. State of Kerala* AIR (refd). (para 18)

(3) The injury inflicted upon the deceased victim was sufficient in the ordinary course of nature to cause death. The force applied by the first appellant was so overwhelming that serious bodily injury was a certainty. The trial judge did not err in

A calling upon the appellant to enter his defence at the close of the prosecution's case. *Mohamed Yasin bin Hussin v. PP* (refd). (paras 19, 20, 21, 26 & 27)

(4) In the instant appeal, the second part of s. 300 limb (c) is B not whether the appellant foresaw the likely result of death, or had intended the result, but that the injury was sufficient in the ordinary course of nature to cause death. The words are clear and simple and they are exactly as what have been legislated. If the injury was sufficient in the ordinary course of C nature to cause death, then the appellant had to face the charge of murder. The appellant had to take the deceased as he found him, in a mental and physical sense. He had to assume the responsibility of the risk of the death when he undertook the act of assaulting the deceased so violently, D leading to a coma and culminating in death. (para 23)

(5) In the instant appeal, since there were no amendments to the charge, ss. 159 and 162 of the CPC were not applicable. The failure to amend the charge complained of by counsel, fell E under paragraph (c) of s. 422 of the CPC. However, with the benefit of being represented by counsel before the trial judge, it was improbable that the appellant could have been misled by the omission to amend the charge or that there could have been a failure of justice by reason of the omission. Even if the F law required the charge to have been amended, the omission was curable and had not caused any injustice to the appellant. The conviction and sentence imposed by the trial judge against the appellant were thus in order. (paras 34, 38 & 39)

(6) The assault at the lock-up only implicated the appellant. There G was absolutely no nexus between the appellant and the other respondents (the 2nd, 3rd, 4th, 5th, 7th accused persons). With the failure of the Public Prosecutor to establish the nexus between the appellant and the respondents, they could not be implicated with the murder of the deceased victim at H all. (paras 42, 43 & 44)

Per Hishamudin Mohd Yunus JCA delivering separate concurring judgment:

I **(1)** In the instant appeal, upon an evaluation of the evidence and the facts, in particular, the evidence of PW6 and PW7, the appellant had indeed committed an act that fell squarely within s. 299 and limb (c) of s. 300 of the Penal Code. It was very

clear from the evidence that the act done by the appellant towards the deceased was an act that was done with the intention of causing bodily injury to the deceased; and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The trial judge was correct in coming to his findings and there was no reason to disturb the same. (paras 65, 66, 67, 68 & 69)

(2) The trial judge was correct when he acquitted and discharged the other accused persons (the 2nd, 3rd, 4th, 5th, 7th accused persons) at the close of the prosecution's case since there was clearly no *prima facie* case established against them. The other accused persons were not present in the lock-up when the appellant assaulted the victim. The appellant committed the act alone and thus the other respondents could not be associated with what the appellant did and could not be criminally liable for what happened in the lock-up. Whatever the other respondents did to the victim, those acts were done independently of the appellant. The appellant and the respondents were not acting in concert in relation to the deceased victim.

(3) The failure of the trial judge to amend the charge either at the close of the prosecution's case or at the close of the defence's case, so as to delete any reference in the charge to the other accused and to s. 35 of the Penal Code, was only a minor error. From the evidence, in particular the evidence of the appellant himself, and bearing in mind that he was defended by counsel at the trial, the appellant was not at all misled or prejudiced in making his defence by such trivial omission. *Msimanga Lesaly v. Public Prosecutor* (foll). (paras 77 & 78)

(4) The failure to amend the charge by the trial judge after acquitting the respondents at the close of the prosecution's case did not render the charge bad in law. Such failure was only a minor error occasioning no miscarriage of justice and thus curable by s. 422 of the CPC. (para 79)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dituduh dengan pertuduhan bunuh di bawah s. 302 di baca bersama s. 35 Kanun Keseksaan bersama-sama dengan enam orang lain. Atas konsesi TPR, tertuduh keenam dilepas dan dibebaskan semasa kes pendakwaan. Di akhir kes pendakwaan,

A hanya perayu sahaja yang dipanggil untuk membela diri, manakala tertuduh-tertuduh lain (tertuduh kedua, ketiga, keempat, kelima dan ketujuh) telah dilepas dan dibebaskan. Kes terhadap perayu – seorang pegawai penjara – adalah bahawa beliau dengan secara ganas dan berterusan telah membelasah seorang banduan di dalam B lokap penjara. Perayu dikatakan telah memukul, menendang dan menyepak kepala banduan tersebut ke dinding dan lantai konkrit lokap, sekaligus menyebabkan banduan menjadi koma dan mati di hospital sembilan hari kemudian. Keterangan perubatan forensik menunjukkan bahawa banduan mati akibat dipukul benda tumpul C di kepalanya, yang menyebabkan berlakunya pendarahan 'arachnoid' pada otaknya. Perayu disabit dan dihukum mati oleh Mahkamah Tinggi dan telah merayu ke Mahkamah Rayuan. TPR juga merayu terhadap pelepasan dan pembebasan tertuduh-tertuduh yang lain (tertuduh kedua, ketiga, keempat, kelima dan D ketujuh). Di Mahkamah Rayuan, selain dari mencabar sabitan dan hukuman, peguam perayu berhujah bahawa kegagalan hakim bicara untuk meminda pertuduhan terhadap perayu dari pertuduhan di bawah s. 302 dibaca bersama s. 35 Kanun Keseksaan kepada hanya pertuduhan di bawah s. 302, selepas melepas dan E membebaskan tertuduh-tertuduh lain, adalah suatu kesilapan serius yang mewajarkan sekurang-kurangnya suatu perbicaraan semula.

Diputuskan (menolak rayuan-rayuan perayu dan TPR):
Oleh Suriyadi Halim Omar HMR (Wan Adnan Muhamad F HMR menyetujui):

(1) Dalam rayuan semasa, hanya serangan yang berlaku di lokap yang memberi gambaran mengenai di mana, bila dan bagaimana kecederaan maut tersebut diperlakukan terhadap mangsa si mati. Hakim bicara betul apabila mendapati bahawa hanya G perayu yang menyebabkan kematian mangsa. Begitu juga, tiada kelompangan pada rentetan sebab musabab dan kematian mangsa adalah berkait rapat dengan perbuatan ganas yang diperlakukan ke atasnya.

H **(2)** Menggunapakai peruntukan-peruntukan ss. 299, 300 dan 302 Kanun Keseksaan, selain dari membuktikan bahawa perayu bertanggungjawab terhadap kematian mangsa, pendakwaan wajib membuktikan bahawa perayu melakukannya dalam halkeadaan yang dirangkumi sepenuhnya oleh jejari (c) s. 300. I Dalam kes semasa, perayu melakukan perbuatan yang dirangkumi sepenuhnya oleh jejari (c) s. 300 Kanun Keseksaan – iaitu suatu perbuatan yang dilakukan dengan niat untuk

menyebabkan kecederaan-kecederaan badan terhadap mangsa si mati; dan kecederaan-kecederaan badan yang diperlakukan tersebut dalam keadaan biasa adalah memadai untuk menyebabkan kematian. Pendakwaan telah berjaya membuktikan *mens rea* spesifik (elemen mental) untuk melakukan kecederaan badan, yang akhirnya membawa kepada kematian, seperti yang terlihat dari bagaimana kepala si mati disepak dan ditendang ke dinding dan lantai konkrit. Keterangan mengenai serangan yang bertalu-talu terhadap kepala si mati, dilihat secara objektif, adalah lebih dari memadai bagi menunjukkan niat yang diperlukan dan sepertimana yang dituntut oleh jejari ketiga s. 300 Kanun Keseksaan. *Rajwant Singh v. State of Kerala* (dirujuk).

(3) Kecederaan yang diperlakukan ke atas mangsa si mati adalah memadai dalam keadaan biasa untuk menyebabkan kematian. Tindakan kekerasan yang diperlakukan oleh perayu adalah melampau dan pasti akan menyebabkan kecederaan badan. Jelasnya hakim bicara tidak khilaf dalam memanggil perayu untuk membela diri di akhir kes pendakwaan. *Mohamed Yasin bin Hussin v. PP* (dirujuk).

(4) Dalam kes semasa, bahagian kedua jejari (c) s. 300 bukan menyentuhi sama ada perayu dapat menjangkakan kemungkinan berlakunya kematian, atau berniat mengakibatkannya, tetapi adalah sama ada kecederaan tersebut adalah mencukupi dalam keadaan biasa untuk menyebabkan kematian. Perkataan-perkataan ini adalah jelas dan bermaksud sepertimana yang diperuntukkan. Jika kecederaan mencukupi dalam keadaan biasa untuk menyebabkan kematian, maka perayu mestilah menghadapi tuduhan membunuh. Perayu mestilah menerima keadaan si mati sepertimana diri si mati itu sendiri, dari segi mental atau fizikalnya. Beliau hendaklah memikul tanggungjawab atas kemungkinan berlakunya kematian apabila beliau menyerang si mati dengan sebegitu ganas, yang membawa kepada koma dan seterusnya berakhir dengan kematian.

(5) Dalam kes semasa, oleh kerana tiada pindaan kepada pertuduhan, maka ss. 159 dan 162 KAJ tidak terpakai. Kegagalan meminda pertuduhan seperti yang disungutkan oleh peguam, adalah dirangkum oleh perenggan (c) s. 422 KAJ. Apapun, dengan perayu diwakili peguam, beliau tidak mungkin terkeliru disebabkan oleh kegagalan meminda pertuduhan tersebut, dan kegagalan itu juga tidak membawa kepada

A ketidakadilan. Jikapun undang-undang mengkehendaki pertuduhan dipinda, kegagalan meminda boleh diubati dan tidak menyebabkan apa-apa ketidakadilan kepada perayu. Maka sabitan dan hukuman yang dijatuhkan oleh hakim bicara terhadap perayu adalah teratur.

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(6) Serangan yang berlaku di lokap hanya membabitkan perayu. Di antara perayu dan responden-responden lain (tertuduh kedua, ketiga, keempat, kelima dan ketujuh) langsung tidak ada hubung kait. Dengan kegagalan Pendakwa Raya membuktikan
C nexus di antara perayu dan responden-responden, maka mereka tidak boleh dilibatkan dengan pembunuhan mangsa si mati.

Oleh Hishamudin Yunus HMR menyampaikan penghakiman menyetujui berasingan:

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(1) Dalam kes semasa, atas pertimbangan fakta dan keterangan, terutama keterangan PW6 dan PW7, perayu sememangnya telah melakukan perbuatan yang dirangkumi sepenuhnya oleh s. 299 dan jejari (c) s. 300 Kanun Keseksaan. Adalah jelas
E dari keterangan bahawa perbuatan yang diperlakukan perayu terhadap si mati adalah diperlaku dengan niat untuk menyebabkan kecederaan badan ke atas si mati; dan kecederaan badan yang diniatkan itu memadai dalam keadaan biasa untuk menyebabkan kematian. Oleh itu hakim bicara
F betul dalam mencapai dapatan-dapatannya dan tiada alasan untuk mengganggui dapatan-dapatan tersebut.

(2) Hakim bicara betul bilamana melepas dan membebaskan tertuduh-tertuduh lain (tertuduh kedua, ketiga, keempat, kelima
G dan ketujuh) di akhir kes pendakwaan kerana jelas tiada kes *prima facie* dibuktikan terhadap mereka. Tertuduh-tertuduh lain tersebut tidak berada di lokap semasa perayu membelasah mangsa. Perayu melakukan perbuatan tersebut seorang diri dan oleh itu responden-responden tidak boleh dibabitkan dengan
H apa yang dilakukan perayu dan tidak boleh bertanggungan secara jenayah atas apa yang berlaku di lokap itu. Mengenai apa yang telah dilakukan oleh responden-responden lain terhadap si mati, perbuatan-perbuatan mereka itu dilakukan secara berasingan dan bebas dari perbuatan perayu.
I Berhubung dengan si mati, perayu dan responden-responden lain tidak bertindak secara bersesama.

(3) Kegagalan hakim bicara untuk meminda pertuduhan sama ada di akhir kes pendakwaan atau di akhir kes pembelaan, supaya dengan itu tiada apa-apa lagi rujukan dibuat oleh pertuduhan terhadap tertuduh-tertuduh lain selain dari perayu, atau kepada s. 35 Kanun Keseksaan, hanyalah suatu kesilapan kecil sahaja. Berdasarkan keterangan, terutama dari keterangan perayu sendiri, dan mengambilkira bahawa beliau dibela oleh peguam di perbicaraan, perayu langsung tidak terkeliru atau diprejudis oleh ketinggalan tidak penting tersebut dalam mengemukakan pembelaannya. *Msimanga Lesaly v. Public Prosecutor* (diikuti).

(4) Kegagalan untuk meminda pertuduhan oleh hakim bicara setelah membebaskan responden-responden di akhir kes pendakwaan tidak menyebabkan kes menjadi cacat di sisi undang-undang. Kegagalan sedemikian hanyalah kesalahan kecil yang tidak membawa kepada salah laksana keadilan dan boleh diubati di bawah s. 422 KAJ.

Case(s) referred to:
Brend v. Wood [1946] 62 TLR 462 ***(refd)***
C Mohammad v. PP [1974] 1 MLJ 25 ***(refd)***
D Yohannan v. State of Kerala (AIR) [1958] Ker 207 ***(refd)***
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 SC ***(refd)***
King v. Aung The Nyun AIR Rang 259 (FB) ***(refd)***
Lee Swee Tee v. PP [1960] 1 LNS 58 ***(refd)***
Mohamed Yasin Hussin v. PP [1976] 1 LNS 75 ***(refd)***
Msimanga Lesaly v. PP [2004] 1 LNS 651 ***(foll)***
Quek Ching Kim v. Regina [1955] 1 LNS 104 ***(refd)***
R v. Champman [1931] 2 KB 606/609 ***(refd)***
Rajwant Singh v. State of Kerala AIR [1966] SC 1874 ***(refd)***
State of Bombay Jal K Patel AIR [1951] Bombay 203 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 62(2)
Criminal Procedure Code, ss. 158, 159, 162, 422
Penal Code, ss. 34, 35, 142, 275, 299, 300, 302, 304, 304A, 377, 415

Other source(s) referred to:
Ratanlal & Dhirajlal, *The Indian Penal Code,* 29th edn, 2002, p 1172

(Criminal Appeal No: C-05-27-06)
For the appellant - Karpal Singh (Sangeet Kaur Deo & Nicholas Netto with him); M/s Karpal Singh & Co
For the respondent - Saiful Edris Zainuddin DPP

(Criminal Appeal No: C-05-94-05)
For the appellant - Awang Armadajaya Awang Mahmud DPP
For the 1st respondent - Datuk Bastian Vendargon; M/s Vendargon & Partners
For the 2nd respondent - Mohd Sukri Mohamed; M/s Wan Haron Sukri & Nordin
For the 3rd respondent - Bob Arumugam; M/s Bob S Arumugam & Co
For the 4th respondent - Richard Bong (Aida Rahayu Abdul Rahman with him); M/s Bong & Co

[Appeal from High Court, Kuantan; Criminal Trial No: 45-(46)-3-2004]

Reported by Andrew Christopher Simon

JUDGMENT

Suriyadi Halim Omar JCA:

[1] These two appeals, C-05-27-06 and C-05-94-05, are connected. They originated from criminal trial No. 45(46)-3-2004, where seven persons were charged for murder under s. 302 of the Penal Code read together with s. 35 of the same Code. All the accused persons in the above case are prison officers and personnel from Penjara Penor, Kuantan.

[2] At the trial, before the commencement of the submissions but still at the prosecution's stage, the learned Deputy Public Prosecutor (DPP) conceded that no *prima facie* case had been established against the sixth accused person, whereupon he was acquitted and discharged. At the close of the prosecution's case, after hearing the submissions of accused persons 1, 2, 3, 4, 5 and 7, the court only called the first accused person to enter his defence, and acquitted accused persons 2, 3, 4, 5 and 7. At close of the defence case the learned trial judge found that the first accused person had failed to cast any reasonable doubt on the prosecution's case and therefore found him guilty. He was accordingly convicted of the charge of murder and sentenced to death.

[3] Pursuant to the order of acquittal of accused persons 2, 3, 4, 5 (hereinafter referred to as respondents) and 7, the Public Prosecutor filed the notice of appeal against the acquittal, registered as C-05-94-05, whilst the convicted accused person, hereinafter referred to as the 'appellant' filed appeal C-05-27-06. Prior to this hearing before us, the Public Prosecutor, *vide* notice dated 26 December 2001, withdrew the appeal against accused

person no. 7 (Ismail @ Mat Daud bin Ideris) hence leaving only the remaining four respondents of C-05-94-05. For the hearing of these appeals, the Public Prosecutor was represented by two deputy public prosecutors, namely, Encik Awang Armadajaya and Encik Saiful Edris.

[4] I decided to hear the appeals together as the facts are connected. The charge against the appellant and respondents reads as follows:

> Bahawa kamu bersama-sama pada tarikh 1.3.2004, di antara jam pukul 4.00 petang hingga 7.00 petang, bertempat di Penjara Penor, Kuantan dalam Negeri Pahang, telah melakukan pembunuhan ke atas Mohd Shukri b. Mohd Yusof Kp No. 850404-06-5179, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 dibaca bersama seksyen 35 Kanun Keseksaan.

[5] Briefly, the facts of the appeals are as follows.

[6] On 1 March 2004, Mohd Shukri bin Mohd Yusof (the deceased) a young man of 19 years, who at that time was under remand at the prison, attempted to escape from the Penor Prison at about 4.10pm. His attempt was discovered and the alarm was raised. At about 4.45pm ie, about 35 minutes later the prison authorities captured him in an area known as Zone Nenas, which is nearby the officers' quarters, and he was brought to the main gate of the prison through a football field. A few prison officers assaulted him at the main gate; thereafter he was taken to the Bilik Unit Kawalan Keselamatan Penjara (the prison lock-up) by a few prison personnel, including SP10 (Sopian Yadi bin Hamzah). SP10 testified that he brought the deceased to the lock-up and saw that the latter was uninjured when depositing him there. In fact the deceased replied verbally to his query as to why he attempted to escape. In other words, the deceased was conscious at that point of time.

[7] At about 5.20pm the appellant, being the officer in charge of the lock-up unit, had directed SP7 (Razali bin Fauzi), a subordinate officer of his, to escort the deceased to the lock-up. On the way to the room, SP9 (warden Khatijah binti Adam) cautioned the four prison wardens who escorted the deceased that he was her relative. Upon arrival at the lock-up room, the appellant ordered those wardens to leave him with the deceased

A with the exception of SP7. Thus, only three persons stayed behind in that lock-up, that is to say, the appellant, SP7 and the deceased.

[8] In the lock-up the deceased sat on the floor, with his hands B handcuffed at the back. The appellant then began kicking and stomping on the head of the deceased causing his head to hit the concrete wall and concrete floor of the room. SP7 saw blood coming out from the mouth of the deceased. The deceased then went into a seizure and lapsed into a coma.

C **[9]** The prison medical assistant arrived subsequently and advised that the deceased be taken to the hospital; but he was only sent to the hospital at about 7pm where he remained in coma without regaining consciousness, until he died on 10 March 2004.

D **[10]** SP7 related what happened in the lock-up. He said:

> Saya panggil orang tahanan bangun dan memberitahunya yang saya hendak bawa dia ke bilik UKP.
>
> E Saya buka lock-up dengan guna kunci. Kunci itu diberi oleh I.P. Azhar Che Wil.
>
> Tahanan itu bangun dan berjalan ke bilik UKP. Tahanan tersebut nampak keletihan sedikit. Tahanan itu diikuti oleh I.P. Azhar Che
> F Wil. … Empat warden penjara: Karim bin Mamat dan yang 3 lagi saya tidak ingat nama, sebab anggota baru. Semasa dalam bilik I.P. Azhar telah arahkan supaya warden penjara itu keluar. Mereka berempat pun terus keluar … Semasa saya berada dalam bilik saya lihat I.P. Azhar memakai sarong tangan getah, yang biasa digunakan untuk periksa banduan. Tahanan tersebut
> G bersandar dalam dalam keadaan bergari di belakang berhampiran penjuru bilik UKP. Dia dalam keadaan duduk. Masa itu saya atas kerusi.
>
> Setelah sarong tangan dipakai, I.P. Azhar tiba-tiba terus memukul tahanan tersebut iaitu dengan menyepak, menendang, menerajang
> H di kepala bertalu-talu serta beberapa kali terhantuk di dinding dan juga di lantai. Saya lihat I.P.Azhar menendang dan menyepak tahanan di badan dan di kepala, sambil mengeluarkan kata-kata "kamu ni menyusahkan orang" beberapa kali. Semasa kejadian itu, saya hanya melarang I.P. Azhar dengan kata-kata "Apa ni tuan?
> I Apa ni tuan?" Tidak ada reaksi apa-apa daripada I.P. Azhar. Setelah itu saya melihat tahanan tersebut mengelupur dan kakinya kejang.

…

… Selain daripada kaki tahanan kejang, saya lihat di mulutnya keluar seketul darah dan diikuti oleh darah yang lain keluar dari mulutnya.

[11] In brief, SP7 testified that the deceased had walked to the lock-up unassisted, though he appeared slightly tired. There, in his (SP7) presence, the deceased was violently and incessantly assaulted on the body and head by the appellant, and the deceased's head was banged a few times on the concrete floor and wall. He then had a seizure and his leg stiffened. A lump of blood came out of his mouth followed by a flow of fresh blood.

[12] The learned trial judge having observed the demeanour of SP7, who was the subordinate to the appellant and under the same unit, found that he was a truthful witness. There is no evidence that suggests of any possible animosity or enmity between SP7 and his superior, against whom he had testified.

[13] According to the pathologist and forensic expert SP6 (Dr Zahari bin Noor), the injury to the head was caused by multiple blunt trauma to the head. That multiple blunt trauma caused serious injury to the head resulting in sub-arachnoid haemorrhage in the brain area. The relevant part of SP6's evidence, which includes the medical report reads as follows:

Saya jalankan bedah-siasat. Hasil daripada pemeriksaan: pada luaran, didapati:

25 kecederaan pada badan simati, iaitu:

1. Luka lebam pada kedua-dua Obit (bahagian mata), yang sampai ke kelopak mata.
2. Luka calar berukuran 4cm panjang pada tengah dahi kanan.
3. Luka calar pada dahi kiri di atas bahagian obit mata kiri, berukuran 3cm panjang.
4. Luka calar dan bengkak pada muka sebelah kiri, berukuran 3cm x2 cm; terletak 2cm di hadapan telinga kiri.
5. Luka calar pada bahagian kepala kanan, bahagian temporal berukuran 3cm x 2cm; terletak 5cm di belakang telinga kanan.
6. Sekumpulan luka calar berganda pada pangkal leher hadapan berukuran antara 4cm – 7cm panjang.

A

7. Luka calar berbentuk linear, pada lengan atas kanan berukuran 4cm panjang.

8. Luka lacerasi berukuran 1cm x 1cm pada lengan bawah kanan, 2cm daripada pergelangan tangan.

B

9. Bahagian atas dan tengah dorsal lengan bawah kanan – luka calar berganda berukuran antara 2cm – 10cm.

10. Luka calar berganda pada bahagian kanan pinggang, berukuran 6cm x 6cm.

C

11. Luka lebam dan calar yang terletak di atas luka yang ke 10, berukuran 1cm x 1cm.

12. Luka calar berganda pada bahagian bahu atas sebelah kiri; berukuran 8cm x 3cm.

D

13. Luka calar berganda pada bahagian lateral tengah bawah lengan kiri;-

3cm x 2cm

14. Luka calar pada siku kiri, 1cm x 2cm.

E

15. Luka calar berganda pada dorsal dalam lengan bawah kiri; 8cm x 6cm.

16. Dua luka lacerasi di bahagian dorsal, medial pergelangan tangan kiri:

F

2cm x 1cm dan 1cm x 1cm.

17. Luka calar berganda pada dada hadapan sebelah kiri: 8cm x 7cm; ada 4 luka yang berselari, yang berukuran 8cm x 7cm, 4 – 5cm, dan jarak ialah 1cm antara satu sama lain. Ada

G

luka yang lebih lebar, iaitu 1cm lebar. Luka-luka ini seperti kesan tapak kasut.

18. Luka lacerasi yang kecil pada lutut kiri: 3cm x 2cm.

19. Luka calar pada lutut kanan; 1cm x 1cm.

H

20. Luka lacerasi pada bahagian dorsal kaki kiri (tapak kaki) di bawah ibu jari: 2cm x 1cm.

21. Luka lacerasi pada bahagian dorsal kaki kiri, di bawah sendiri jari kaki ke 2: 1cm x 1cm.

I

22. Luka calar pada bahagian hadapan betis kanan: 2cm panjang.

23. Dua luka calar, bentuk "tram-line", melengkung ke dalam, arah ke atas, pada bahagian belakang – dibelakang tulang scapula kanan: 7cm panjang dan jarak ialah 1.5cm.

24. Dua luka calar bentuk tram-line – bahagian belakang dada, di bawah luka No. 23, arah melintang dan berukuran 6 cm panjang dan jarak 1.5cm;

25. Dua luka calar bentuk elictical (semi circle) – dua luka hampir bertemu, bentuk U: 6 cm x 1.5cm; pada bahagian punggung kanan.

Luka-luka ini menunjukkan kesan-kesan "process healing".

Anggaran

Luka-luka ini berumur antara 7 – 14 hari.

Saya juga dapati pada bahagian kiri kepala, kesan luka pembedahan yang masih berjahit: 8 jahitan. Ini adalah kesan pembedahan.

Hasil daripada pemeriksaan dalaman, saya telah periksa kepada kepala: Terdapat pendarahan pada lapisan kulit kepala, sebelah kiri belakang "prietobecital" dan bahagian kepala sebelah kanan "frontal".

Saya telah membuat pembedahan pada bahagian otak. Didapati lapisan otak banyak pendarahan yang nyata adalah pendarahan "sub-arachnoid" yang menyeluruh pada bahagian otak. Ada juga tumpok-tumpok pendarahan "sub-dural" pada bahagian otak. Dan juga terdapat pada kiri otak kesan extra-dural pendarahan.

Kesimpulan dari kecederaan yang ditemui, sebab kematian adalah kecederaan dalam kepala yang disebabkan oleh trauma tumpul yang berganda. Trauma tumpul berganda ini disebabkan oleh perbuatan ataupun tindakan pukulan atau hentakan atau tendangan atau hentaman pada permukaan yang tumpul, seperti dinding atau lantai atau tanah.

...

Perbezaan antara sub-dural heamorrhage dan sub-arachnoid heamorrhage – kedua-duanya adalah kecederaan di kepala, tetapi "sub-arachnoid" adalah kecederaan pada lapisan otak yang lebih bawah dan lebih menyeluruh, sementara "sub-dural" ia adalah kecederaan pada lapisan otak yang lebih atas dan tidak menyeluruh, ianya localize, "Sub-arachnoid" adalah lebih menunjukkan kecederaan otak yang lebih teruk."

[14] Reflecting on the physical cause of death, ie, the multiple blunt trauma to the head, only the incident at the lock-up could indicate the whereabouts, time and how the fatal injury was inflicted on the deceased. Considering the evidence as a whole, I was satisfied that:

(i) there was no evidence to show that the "multiple blunt trauma" to the head that caused the haemorrhage to the brain occurred at the football field or at the main gate; hence the correctness of the learned judge's finding that only the appellant had caused the death to the deceased;

(ii) there was no evidence to show that there were some intervening causes that could have disturbed the sequence of events and exonerated the first accused. In a nutshell there was no break in the chain of causation in that the deceased had immediately been taken to hospital after the assault, and had remained comatose until his death; and

(iii) the swiftness of the death ie, within ten days, discounts any doubt of intervening factors whether factually or legally that injury was the cause of the death (*D Yohannan v. State of Kerala* (AIR) [1958] Ker 207). The death was too proximate to the act of violence.

[15] Many provisions of the Penal Code specifically spell out the need for *mens rea*, and even indicate exactly the species of *mens rea* to be established. Some examples are s. 142 of the Penal Code which provides that an offence is committed if he "intentionally joins" an unlawful assembly, or an offence is committed if a person "knowing any drug … to have been adulterated" … sells such drug (under s. 275), or an offence is committed by doing 'any rash or negligent act under s. 304A, or s. 377 that requires "voluntarily", s. 415 demanding "fraudulently" etc. (*Criminal Law in Singapore and Malaysia* by KL Koh, CMV Clarkson and NA Morgan). Having said that, there are ample authorities to suggest that to ensure protection of liberty, unless a statute clearly rules out *mens rea* as a constituent part of a crime, a person should not be convicted unless guilty mind has been established (*Brend v. Wood* [1946] 62 TLR 462).

[16] Section 302 of the Penal Code is silent as to the specific intention requirement as it merely reads, "Whoever commits murder shall be punished with death." Yet, not unlike some of the abovementioned Penal Code provisions, the specific intention is legislated under the connected provisions, and they are as follows:

299. Whoever causes death by doing an act with the *intention* of causing death, or with the *intention* of causing such bodily injury as is likely to cause death, or with the *knowledge* that he is likely by such act to cause death, commits the offence of culpable homicide.

300. Except in the cases hereinafter excepted, culpable homicide is murder:

(a) if the act by which the death is caused is done with the *intention* of causing death;

(b) if it is done with the *intention* of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the *intention* of causing bodily injury to any person, and the bodily injury *intended* to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act *knows* that it is so *imminently* dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid (emphasis added).

[17] The above s. 299 in brief defines the offence of culpable homicide whilst s. 300 provides that murder is a type of culpable of homicide, with death being the only punishment if found guilty of murder. Be it for murder or some other form of culpable homicide the *actus reus* is causing the death of a human being.

[18] Applying the above provisions of ss. 299, 300 and 302 of the Penal Code to the facts of the case, for the appellant to be guilty of the crime of murder, apart from establishing that he caused the death of the deceased, it is also incumbent upon the prosecution to show that he did it in circumstances that fall squarely within one of the limbs of s. 300. Here he had committed an act that falls squarely within limb (c) of s. 300 of the Penal Code, an act done with the intention of causing bodily injury to the deceased; and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death. The prosecution had successfully established that specific *mens rea* (mental element) for the bodily injury, which eventually led to the resultant death, as seen from the manner the head of the deceased was kicked and stomped against the concrete wall and

floor. The evidence of the repeated assaults on the head of the deceased, looking at it objectively, was more than sufficient to establish the requisite intention as prescribed by the 3rd limb of s. 300 of the Penal Code (*Rajwant Singh v. State of Keral* AIR [1966] SC 1874).

[19] As regards whether the inflicted injury was sufficient in the ordinary course of nature to cause death, the learned judge made a correct finding of fact when he stated so positively after having evaluated the evidence. He authored:

> Every Tom, Dick and Harry, as human beings, is fully aware that the head is a vulnerable and vital part of a human being. One need not be in the medical field to know such basic fact. It therefore flows that any hard kicking and stomping of the head and especially repeatedly against a hard surface like a concrete wall or a concrete floor, can cause injuries that is sufficient to cause death in the ordinary course of nature.

[20] The learned judge had correctly alluded to *Mohamed Yasin bin Hussin v. PP* [1976] 1 LNS 75, where the Privy Council had held that:

> ... he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity as such as to make it likely to prove fatal.

[21] In the present case, the force applied by the first appellant was so overwhelming that serious bodily injury was a certainty.

[22] Penal statutes from early times have always been construed rather strictly, and with individual liberties a favourite topic, they are also construed in favour of the subject, especially provisions relating to the offence of murder (*R v. Champman* [1931] 2 KB 606/609; *King v. Aung The Nyun*, AIR Rang 259 (FB)). In modern times, a change has taken place in that such statutes are to be construed fairly like other statutes according to the intention of the legislature. The paramount duty now is to put the words into effect, "honestly and faithfully, its plain and rational meaning and promote its object" (*State of Bombay v. Jal K Patel* (AIR) [1951] Bombay 203). There is thus no necessity to strain the words and phrases when they cannot be strained beyond their ordinary meaning. They should be given their natural meaning when the words are perfectly plain.

[23] In the current case, the second part of the requirement of the third limb of s. 300 as promulgated by Parliament is not of whether he foresaw the likely result of death, or had intended the result, but that the injury was sufficient in the ordinary course of nature to cause death. The words are clear and simple and they are exactly as what have been legislated. If the injury was sufficient in the ordinary course of nature to cause death, then the first appellant must face the charge of murder. The first appellant will have to take the deceased as he finds him, in a mental and physical sense. He has to assume the responsibility of the risk of the death when he undertook the act of assaulting the deceased violently to the point of comatose and culminating in death.

[24] The Indian Penal Code has a similar provision to the Malaysian provision of murder, though not in *pari materia*, with the Malaysian third limb of s. 300 of the Penal Code, and it reads:

> S. 300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or
>
> 2ndly …
>
> 3rdly If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or …
>
> Illustrations
>
> (a) ….
>
> (b) ….
>
> (c) … A, intentionally gives Z a sword cut or club wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

[25] In *The Indian Penal Code* by Ratanlal & Dhirajlal, 29th edn 2002 at p. 1172 the writer wrote:

> To attract the provisions of clause thirdly of Section 300, I.P.C the prosecution should prove that the injuries on the person of the deceased were caused with an intention to inflict those injuries and none of the injuries was caused unintentionally. It should further be proved that the injuries caused to the deceased were sufficient in the ordinary course of nature to cause his death.

A …

> The third clause of this section views the matter from a general standpoint. Here the emphasis is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the nature of the weapon used, sometimes the part of the body on which the injury is caused and sometimes both are relevant.

[26] From the evidence of SP6, I was satisfied that there was sufficient injury in the ordinary course of nature to cause death. Here sufficiency was established by the evidence of the number of blows, the force and nature of the blows and the parts of the body afflicted, in particular, the head, intentionally inflicted by the first appellant on the deceased, and the eventual serious injury which led to comatose, and not just because he died.

[27] Based on the evidence, I found no error in the factual finding of the learned judge when he called upon the appellant, to enter his defence at the close of the case for the prosecution.

[28] It is my observation that the approach and emphasis in the appeal against the conviction by learned counsel for the appellant was directed more at some procedural defects, and the failure on the part of the trial judge to reject the evidence of SP7, whose evidence had directly implicated the appellant to the murder. Learned counsel briefly mentioned the background of SP7, with the insinuation that he was a person of dodgy character and could have been the one who roughed up the deceased. However, this argument was not seriously pursued. The emphasis of counsel's submission was more on the learned judge's failure to amend the charge first before calling the defense, or even at the conclusion of the trial, and contended by counsel that a retrial should be ordered.

[29] This new argument was made possible, as by consent, the appeal records were amended to include this argument as augmented in the notis usul, which reads:

> 1. Mahkamah Yang Mulia ini membenarkan perayu untuk memasukkan ke dalam petisyen rayuan tersebut alasan tambahan yang berikut dan menghujahkannya pada pendengaran bagi rayuan ini:

(1) Yang Arif Hakim perbicaraan yang bijaksana tersilap dalam tidak meminda pertuduhan asal (dibawah seksyen 302 dan dibaca bersama seksyen 35, Kanun Acara Jenayah) kepada suatu pertuduhan dibawah seksyen 302 terhadap perayu pada peringkat penutupan kes pendakwaan selepas membebas dan melepaskan tertuduh 2, 3, 4, 5 dan 7 ...

[30] The argument advanced by appellant's counsel was that the learned trial judge was in error, in not amending the original charge under s. 302 read with s. 35 of the Penal Code, to one under s. 302 only against the appellant at the close of the prosecution's case after acquitting and discharging the respondents and the seventh accused person. Counsel pointed out that the appellant was still referred to as the first accused even at the defence stage. For ease of reference I reproduce s. 35 of the Penal Code:

Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

[31] It is undisputed that the three alternatives were explained to the appellant in this case and he elected to give evidence under oath. At the close of the case for the defence, the appellant was found guilty, convicted, and sentenced to death but again the charge against the appellant was not amended. The appellant's counsel argued that s. 158 of the Criminal Procedure Code empowers the court to amend a charge before judgment is pronounced; and that sub-section (2) of s. 158 requires the amended charge to be read and explained to the accused. We reproduce below s. 158. It reads:

Court may alter or add to charge

158(1) ...

(a) ...

...

(2) Every such alteration or addition shall be read and explained to the accused.

[32] The defence counsel submitted that by reason of the non-compliance of s. 159 and s. 162 of the Criminal Procedure Code, and in the interest of justice, having regard to the sentence of

death, which had been passed against the appellant, an order for a retrial ought to be made. He even ventilated that due to that error in not amending the original murder charge this panel thus was without jurisdiction to reduce the charge. Regardless of that stance I was not unmindful of s. 304 of the Penal Code, as learned counsel was asked whether the court was hindered from considering an offense under that section. He replied in the negative. Pertaining to this recourse, I need to state that having sifted the evidence, no redeeming features were found for the court to consider.

[33] The relevant provisions of s. 159 and s. 162 are as follows:

> **When trial may proceed immediately after alteration or addition**
>
> 159. If a charge is framed or alteration or addition made under either section 157 or 158, the Court shall immediately call upon the accused to plead thereto and to state whether he is ready to be tried on the charge or altered or added charge. If the accused declares that he is not ready, the Court shall duly consider the reasons he may give and if proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after the charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered or added charge had been the original charge.
>
> **Recall of witnesses when charge altered**
>
> 162. Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been examined, and may also call any further evidence which may be material.

[34] Encik Saiful, the learned DPP, submitted that as no amendments were done to the charge, therefore, ss. 159 and 162 were inapplicable in the circumstances of the case. He further argued that the appellant was not prejudiced by the fact that the charged was not amended. I was in agreement with the submission of the learned DPP that since there were no amendments done to the charge, therefore, s. 159 and s. 162 did not apply.

[35] In the course of the deliberation, I was also mindful of s. 422 of the Criminal Procedure Code, which reads:

> **Irregularities not to vitiate proceedings**
>
> 422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;
>
> (b) the want of any sanction, or
>
> (c) the improper admission or rejection of any evidences,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[36] As regards the above provision, there is thus a need for some discussion on the phrase, "failure of justice'. In *Kiew Foo Mui & Ors v. Public Prosecutor* [1996] 1 CLJ 14, the appellants were convicted of murder under s. 302 of the Penal Code, read with s. 34 of the Code. The first and third appellants were sentenced to death whilst the second appellant was ordered to be detained. The prosecution's case depended upon circumstantial evidence and the cautioned statements of each of the appellants. The defence objected to the admissibility of the statements, whereupon witnesses were called by the prosecution to establish the voluntariness of the statements, and were cross-examined by the defence. The appellants gave evidence alleging that the cautioned statements were made due to inducement. The judge eventually held the statement admissible. When the trial proper resumed in the presence of the assessors, the cautioned statements were then read in evidence. However, the prosecution witnesses who had testified during the trial within a trial were not recalled by the prosecution to repeat their testimony before the assessors, nor did the defence apply to recall them for cross-examination. The issue before the court was whether the omission was so serious as to justify the quashing of the convictions. Section 422 was considered in the course of the deliberation. The court opined that if the challenge to the admissibility of a confession fails in a trial within a trial, it was the duty of the

A prosecution to ensure that the evidence of the confession and the circumstances in which it had been obtained be given in the presence of the jury or the assessors. Here as the prosecution witnesses had not been recalled by the prosecution to repeat their testimony the defence had lost the opportunity to cross-examine
B them all over again on the issue of voluntariness. It was also held that it was of fundamental importance to the administration of criminal justice that the accused person should feel that he has had a fair trial. The mistake of his counsel in omitting to apply for the recall of the prosecution witnesses did not relieve the
C prosecution of its duty to ensure that they were recalled, for to hold to the contrary would be to reverse the onus of proof with regard to cautioned statements, which at all times, lay upon the prosecution.

D **[37]** The court opined that the expression 'failure of justice' was synonymous with 'miscarriage of justice'. By the court's failure to recall the prosecution witnesses, the effect of the breaches was to sever an important artery of evidence for the consideration of the assessors in as far as the defence were concerned, thereby
E occasioning a failure of justice within the meaning of s. 422 of the Criminal Procedure Code (FMS Cap 6).

[38] Section 422 enumerates the irregularities which do not vitiate proceedings (to use the words of the sub-title). It has the effect
F of curing both defects (error, omissions and irregularities as in limb (a)) (which may not be construed as substantive), as well as the shortcoming of (total) want of any sanction (limb (b)), and the improper admission or rejection of any evidence (limb (c)). The specific issue argued by learned counsel in this appeal inevitably
G falls under limb (a), which, *inter alia* deals with omissions, found in a host of factual situations pursuant to a trial, inquiry or proceeding under the Criminal Procedure Code.

[39] In my view, with the benefit of being represented by counsel before the trial Judge, it was improbable that the appellant could
H have been misled by the omission to amend the charge, or that there could have been a failure of justice by reason of the omission. Even if the law requires such an amendment, that omission was curable, and has not caused any injustice to the first appellant. Fortified by the provision of s. 422 of the Criminal
I Procedure Code, I was satisfied that the finding of guilt, conviction and sentence passed by the learned judge trial were in order.

[40] To conclude this appeal, based on all the above reasons, including the rejection of the argument on the non-amendment of the charge, this panel confirmed the finding of guilt, conviction, and the sentence of death as imposed by the learned trial judge against the appellant; and accordingly dismissed his appeal (C-05-27-06).

[41] I now move on to the Public Prosecutor's appeal against the acquittal of the four respondents (C-05-94-05). At the end of the hearing this panel dismissed the appeal against their acquittal. But what caused consternation in me was the pursuance of the appeal against the four respondents despite the admission by the Public Prosecutor of the death of evidence to successfully prosecute it. From the flow of events on that fateful day, the involvement of the respondents *vis-à-vis* the deceased may be segmented into three incidents according to the chronological order of events, and they are as follows:

(i) in an area within the prison compound known as Zone Nenas, where the deceased was first apprehended, with this incident implicating only the third respondent;

(ii) at the football field, where the deceased was alleged to have tried to struggle free but prevented from so doing, in which only the fourth and fifth respondents were implicated; and

(iii) at the main gate, where the deceased was assaulted by the second respondent.

[42] The incident at the lock-up only implicated the appellant; and was without the presence of the four respondents. It was in evidence that after being assaulted, be it at the Nenas Zone, the football field or the main gate, the deceased was still able to walk unassisted to the lock-up room, where the appellant subsequently assaulted him to the point of comatose followed by death a few days later. At no time was the appellant present at the Nenas Zone, football field or the main gate, and likewise the four respondents were never in the lock-up room when the deceased was assaulted. With the prison's CCTV tape being inadmissible, the issue of identification of who assaulted the deceased outside the lock-up remains unresolved.

[43] There was thus absolutely no evidence of any nexus between the appellant and the respondents and this was admitted by the learned DPP who dealt with appeal C-05-94-05. To regurgitate his concession, as per the notes of proceedings:

A Bob Arumugam: The four of them were never in the room. Judge finding of fact. 144RR … 5 did not go out of room.

Awang (DPP): Saya silap. Mereka tiada di bilik. 4 respondents never met accused along the way.

B **[44]** How could the respondent know the mind of the appellant as required by s. 35, when they never met from 4.45pm to 7pm on that fateful date? With the failure of the Public Prosecutor to establish the nexus between the appellant and the respondents, they could not be implicated with the murder of the deceased at C all.

[45] As said earlier, this panel had unanimously dismissed the Public Prosecutor's appeal, and had accordingly affirmed the High Court order of the acquittal of the respondents (C-05-94-05).

D **[46]** My brother Justice Dato' Wan Adnan Muhamad, JCA has read the draft copy of this judgment and agreed with the contents herein.

Hishamudin Mohd Yunus JCA:

E (A separate judgment written with the permission of the Rt. Hon. President of the Court of Appeal pursuant to the proviso to subsection (2) of s. 62 of the Courts of Judicature Act 1964)

F **[47]** These two appeals, Court of Appeal Criminal Appeal No. C-05-27-06 and Court of Appeal Criminal Appeal No. C-05-94-05, are related and were heard together. They originated from the High Court of Kuantan Criminal Trial No. 45(46)-3-2004. At the Kuantan High Court, seven persons were charged for the offence G of murder under section 302 of the Penal Code read together with section 35 of the same Code.

[48] Section 35 of the Penal Code states:

When such an act is criminal by reason of its being done with H **a criminal knowledge or intention**

35. Whenever an act, which is criminal only by reason of its being done with criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same I manner as if the act were done by him alone with that knowledge or intention.

[49] All the accused in the above case are prison officers and personnel from Penor Prison, Kuantan. A

[50] At the trial, before the commencement of submissions at the close of the case for the prosecution, the learned Deputy Public Prosecutor (DPP) conceded that no *prima facie* case had been made out in respect of the sixth accused (Shamsul Darniza bin Ismail). Hence, he was acquitted and discharged. B

[51] At the close of the case for the prosecution, after hearing submissions, the trial court called only the first accused to enter his defence. The remaining six accused were acquitted and discharged. C

[52] The first accused elected to give evidence under oath. Only the appellant gave evidence (as DW1). He did not call any witnesses. D

[53] At close of the case for the defence, the learned trial judge found that the first accused had failed to raise a reasonable doubt against the prosecution's case and therefore found him guilty of the crime of murder. He was accordingly convicted of the charge of murder and sentenced to death. E

[54] The first accused now appeals to the Court of Appeal. He is the appellant in Criminal Appeal No. C-05-27-2006. For the sake of clarity and convenience, I shall be referring to him in this judgment as 'the appellant' or 'the first accused'. F

[55] The Public Prosecutor has cross-appealed against the acquittal of the second, third, fourth and fifth accused. These four accused are the respondents in Criminal Appeal No. C-05-94-05. In this judgment, I shall be referring to them as 'the respondents'. G

[56] At the High Court, the charge against the appellant and respondents reads as follows:

> Bahawa kamu bersama-sama pada tarikh 1.3.2004, di antara jam 4.00 petang hingga 7.00 petang, bertempat di Penjara Penor, Kuantan, dalam Negeri Pahang, telah melakukan pembunuhan ke atas Mohd Shukri b. Mohd Yusof Kp No. 850404-06-5179, dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 dibaca bersama seksyen 35 Kanun Keseksaan. H I

[57] Briefly, the following are the facts of the case.

[58] On 1 March 2004, at about 4.10pm, the deceased, a 19 year old youth by the name of Mohd Shukri bin Mohd Yusof, tried to escape from Penor Prison in Kuantan. He was a remand prisoner at the prison. His attempt to escape failed. The attempt was discovered and the alarm was raised. At about 4.45pm the same day the prison officers managed to apprehend him in an area known as Zone Nenas, and he was brought, through a football field, to the main gate of the prison. A few prison officers assaulted him while he was at Zone Nenas, at the football field and at the main gate. From the main gate he was taken to the lock-up. At about 5.20pm the appellant, Prison Inspector Azhar bin Che Wil, who was the Head of the Security Unit of the prison, directed his subordinate, prison officer Razali bin Fauzi (PW7), to bring the deceased to a room known as Bilik Unit Kawalan Keselamatan Penjara (Prison Security Control Unit Room – hereinafter shall be referred to as 'the room' or 'the UKK room'). PW7 brought the deceased to the room. Upon arrival at the room, four prison wardens were already there. The appellant ordered these wardens to leave the room, with the exception of PW7. They did as told leaving only three persons in that room, namely, the appellant, PW7 and the deceased. In the room the deceased was made to sit on the floor. His hands were handcuffed at the back. PW7 testified that he saw the appellant putting on a pair of rubber gloves. Then, for no apparent reason, the appellant began kicking and stomping the head of the deceased several times, causing his head to hit the concrete wall and the concrete floor of the room. He also kicked the deceased at the chest. PW7 heard the appellant uttering the words, 'Kamu ni menyusahkan orang' several times while assaulting the deceased. PW7 then saw blood coming out from the mouth of the deceased. The deceased went into a seizure and lapsed into a coma.

[59] Seeing the condition of the deceased, the appellant instructed PW7 to call the prison medical assistant. The latter, Mohd Paddli (PW8), arrived and on seeing the condition of the deceased advised the appellant to have the deceased taken to the hospital as soon as possible. PW8 in his evidence said:

> Apabila tiba di bilik UKP, didapati mangsa terbaring. Ada kesan basuhan di hujung penjuru lantai bilik UKP. Mangsa telah tidak sedar diri, tekanan darah rendah dan pernafasan tersekat-sekat. Masa itu Razali (PW7) dan tuan Azhar ada di situ.

[60] In cross-examination, PW8 said:

> Pada 5.30 petang saya telah dipanggil ke bilik UKP. Saya lihat mangsa, pada ketika itu, tidak sedar. Selepas saya jalankan pemeriksaan, saya meminta mangsa mengucap. Ini ialah selepas pemeriksaan ke atas mangsa. Mangsa tidak dapat mengucap. Selepas itu dia dibawa ke hospital.

[61] At about 6.30pm the deceased was taken by a prison van to the hospital, accompanied by the appellant, PW7, PW8 and three other prison officers, arriving at the hospital around 7pm. Throughout, the deceased remained in coma without regaining consciousness. He was in that state until he died on 10 March 2004.

[62] The only witness who saw what had happened to the deceased in the UKK room was PW7. The learned trial judge, having observed the demeanor of PW7, found that he was a truthful witness. On the evidence, I see no reason to disagree with this finding of the learned trial judge.

[63] According to the pathologist and forensic expert, Dr. Zahari bin Noor (PW6), the death of the deceased was caused by serious internal injury in the head, and that injury was caused by multiple blunt trauma to the head. The multiple blunt trauma had caused sub-arachnoid haemorrhage in the brain area.

[64] In his evidence, PW6 said:

> Saya telah membuat pembedahan pada bahagian otak. Didapati lapisan otak banyak pendarahan yang nyata adalah pendarahan 'sub-arachnoid' yang menyeluruh pada bahagian otak. Ada juga tompok-tompok pendarahan 'sub-dural' pada bahagian otak. Dan juga terdapat pada kiri otak kesan extra-dural pendarahan.
>
> ...
>
> Kesimpulan dari kecederaan yang ditemui, sebab kematian adalah kecederaan dalam kepala yang disebabkan oleh trauma tumpul yang berganda. Trauma tumpul berganda ini disebabkan oleh perbuatan ataupun tindakan pukulan atau hentakan atau tendangan atau hentaman pada permukaan yang tumpul, seperti dinding atau lantai atau tanah.

[65] In the present case, upon an evaluation of the evidence and the facts, in particular, the evidence of PW6 and PW7, I am satisfied that the appellant had committed an act that falls squarely within s. 299 and limb (c) of s. 300 of the Penal Code. Section 299 states:

A **Culpable homicide**

299. Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable
B homicide.

[66] Section 300 limb, (c) provides:

Murder

C **300. Except in the cases hereinafter excepted, culpable homicide is murder:**

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

D **[67]** In my judgment, it is very clear from the evidence that the act done by the appellant towards the deceased was an act that was done with the intention of causing bodily injury to the deceased; and the bodily injury intended to be inflicted was sufficient in the ordinary course of nature to cause death.
E

[68] On the evidence, I am satisfied that the learned trial judge had made a correct finding when he said:

Every Tom, Dick and Harry, as human beings, is fully aware
F that the head is a vulnerable and vital part of a human being. One need not be in the medical field to know such basic fact. It therefore flows that any hard kicking and stomping of the head and especially repeatedly against a hard surface like a concrete wall or a concrete floor, can cause injuries that are sufficient to cause death in the ordinary course of nature.
G

[69] The appellant in his defence alleged that the deceased was already in a very weak condition even before he (the deceased) entered the UKK room such that the appellant together with PW7 had to assist the deceased to walk to the room. As to this
H allegation, there is, however, no evidence to suggest that the deceased was already seriously injured prior to him being brought to the room. On the contrary – and significantly – there is evidence of several witnesses, namely, PW7, Supian Yadi (PW10) and Khatijah bt Adam (PW9) that the deceased was able to walk
I on his own, in a normal manner and unaided, to the UKK room. In my judgment, I see no reason to disturb the finding of the learned trial judge as to the condition of the deceased prior to the incident in the UKK room.

[70] Now, as to the Public Prosecutor's appeal against the respondents, on the evidence the learned trial judge was correct when he acquitted and discharged them at the close of the case for the prosecution. There was, clearly, no *prima facie* case established against them.

[71] In the first place, the respondents were not present in the UKK room when the appellant assaulted the deceased. This means the act of assault by the appellant cannot be said to be an act 'done by several persons' (the phrase used in s. 35 of the Penal Code). The appellant did the act alone. Hence the respondents could not be associated with what the appellant did and could not be held criminally liable for what happened in the UKK room. The only evidence against the respondents was that they had assaulted the deceased before the deceased was brought to the UKK room. There is evidence that the deceased was assaulted by the second respondent (Prison Inspector Suhaimi bin Nordin) while the deceased was at Zone Nenas; and there is evidence that the deceased was assaulted by the third and fourth respondents (prison officers Mohamad Hamdan bin Mohd Yaakob and Ahmad Rizal bin Ab. Halim) while he was at the football field. There is evidence that the first respondent (prison officer, Deputy Superintendent Teyun Thian Him) and the third respondent participated in the assault on the deceased at the main gate of the prison. But when these assaults took place, the appellant was not present: he was not present either at Zone Nenas or at the football field or at the main gate when the assaults by the respondents took place. Whatever the respondents did to the deceased, those acts were done independently of the appellant. In other words, the appellant and the respondents were not acting in concert in relation to the deceased. It is, however, true that all the incidents happened in the prison compound and on the same day. But the incidents happened at different locations or areas and at different times and involved different individuals (except that Mohammad Hamdan (the third respondent) was involved in the football field incident as well as in the main gate incident).

[72] Now, reverting to the appellant's case, Encik Karpal Singh, the learned counsel for the appellant, submitted that as the appellant was jointly charged together with the other accused by the prosecution invoking s. 35 of the Penal Code, the learned trial judge should have amended the charge when he called upon the appellant to enter his defence and acquitted and discharged the other co-accused. It is counsel's contention that any reference in

A the charge to the other accused and s. 35 should have been deleted from the charge at the close of the prosecution's case after acquitting and discharging the other co-accused. Encik Karpal referred to s. 158 of the Criminal Procedure Code. This section reads:

B

158. Court may alter or add charge

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

C (2) Every such alteration or addition shall be read and explained to the accused.

[73] The learned counsel further submitted that, by reason of the failure on the part of the trial judge to amend the charge, the appellant was deprived of his right to recall witnesses as accorded D to him by s. 162 of the Criminal Procedure Code. Hence there was a miscarriage of justice and there ought to be a retrial.

[74] Encik Karpal, in support of his argument, referred to the following cases:

E

(1) *Quek Ching Kim v. Regina* [1955] 1 LNS 104;

(2) *Lee Swee Tee v. Public Prosecutor* [1960] 1 LNS 58; and

(3) *C. Mohammad v. Public Prosecutor* [1974] 1 MLJ 25.

F

[75] With respect to counsel, I do not find these cases as being of any assistance or relevance to the position that he adopted.

[76] Section 162 provides:

G

162. Recall of witnesses when charge altered

Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witness who may have been H examined, and may also call any further evidence which may be material.

[77] In my judgment, in the context of the present case, the failure on the part of the learned trial judge to amend the charge I either at the close of the prosecution's case or at the close of the defence's case, so as to delete any reference in the charge to the other accused and to s. 35 of the Penal Code, is only a minor error; and judging from the evidence, in particular the evidence of

the appellant himself, and bearing in mind that he was defended by counsel at the trial, I am satisfied that he was not at all misled or prejudiced in making his defence by the trivial omission. In *Msimanga Lesaly v. Public Prosecutor* [2004] 1 LNS 651, a case that I decided at first instance at the High Court of Alor Setar, that went on appeal to the Court of Appeal and finally to the Federal Court, Gopal Sri Ram JCA (as he then was), in delivering the judgment of the Federal Court, said:

> Taking the first ground, it is important to recall that the appellant was initially charged with another person. Accordingly, the charge carried in it the allegation that the two accused had acted in furtherance of a common intention under s. 34 of the Penal Code. Once the co-accused was acquitted at the close of the prosecution's case, the allegation of common intention fell to the ground. The charge had to be amended to reflect the fact that the appellant had solely trafficked in the drug in question. It was. But the wording in the charge was not so perfectly amended as to rid itself of all references to the element of the appellant having acted with another person. That in our view does not render the charge bad. For, it is well settled law that s. 34 of the Penal Code does not create a substantive offence but is merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons: *Chota bin Abdul Razak v. Public Prosecutor* [1991] 3 MLJ 77. In *Teh Thiam Huat v. Public Prosecutor* [1996] 3 SLR 631, the same complaint was raised on appeal. Karthigesu JA dealt with it as follows:
>
> > We should, however, mention that an issue was raised that as the capital charge of trafficking was a common intention charged and the learned judge having acquitted the other conspirator, Tay Bee Hoon, the conviction of the appellant without amending the charge was irregular. True, the learned judge did not amend the charge; he found that the appellant alone was in possession of the 40 sachets of heroin and that he failed to make good that he was in possession of the 40 sachets for his and Tay Bee Hoon's consumption. Suffice it to say that section 34 of the Penal Code does not create a substantive offence; it lays down only a rule of evidence to infer joint responsibility (per Thean J (as he then was) in *Chota bin Abdul Razak v. PP* [1991] 3 MLJ 77; [1991] SLR 675). Accordingly there was nothing irregular about the appellant's conviction on the capital charge of trafficking.

[78] Likewise here, the failure to amend the charge by the trial judge after acquitting the respondents at the close of the prosecution's case does not render the charge bad in law. It is to be noted, however, that in *Msimanga Lesaly* the charge involves s. 34 of the Penal Code whereas in the present case the charge involves s. 35 of the same Code. But to my mind, the principle in *Msimanga Lesaly* should equally apply here.

[79] As the failure by the learned trial judge to amend the charge is only a minor error, then, by reason of s. 422 of the Criminal Procedure Code, the proceeding and judgment of the learned trial judge ought not to be disturbed or vitiated, as no miscarriage of justice had been occasioned by the error. Section 422 reads:

Irregularities not to vitiate proceedings

422. Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of:

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[80] In conclusion, both appeals (by the appellant and by the Public Prosecutor) are dismissed.